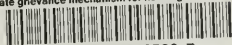


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STAFF REPORT NO. 13

STATE GRIEVANCE MECHANISM FOR  
NON-ORGANIZED EMPLOYEES AND  
AVENUES OF JUDICIAL REVIEW

# PLEASE RETURN

Objective: To provide additional information to the Personnel and Labor Relations Study Commission on Study Question 1; specifically:

What kinds of grievances can be appealed to or initially brought in District Court, both in the presence and in the absence of an independent grievance appeals body?

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Prepared by:

Patricia J. Schaeffer, Attorney  
Personnel Division

March 26, 1982

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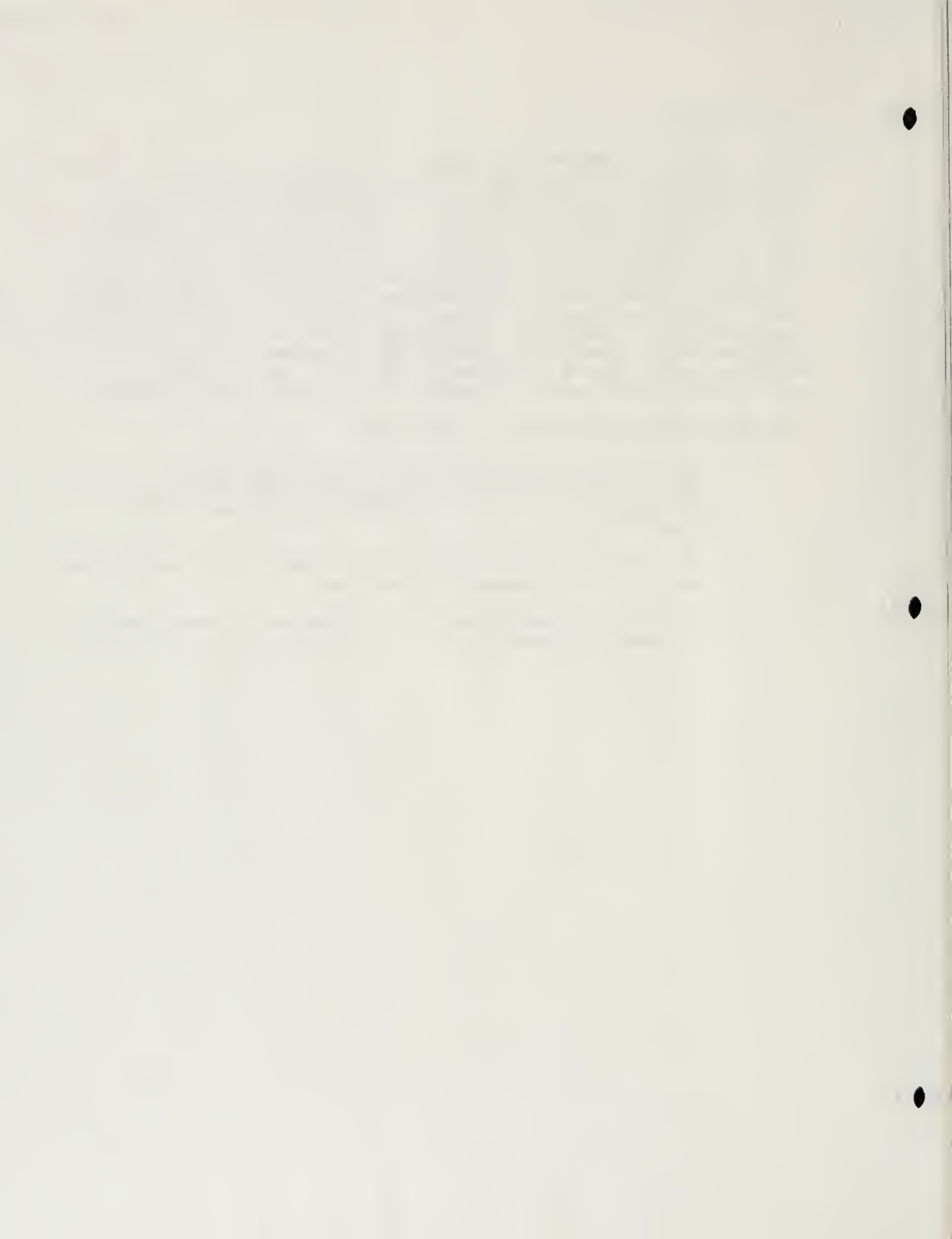
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## INTRODUCTION:

This report is intended as a supplement to Staff Report No. 1 which explains in detail the grievance mechanisms available to non-organized state employees. As noted in that report, all agencies except Highways and Fish, Wildlife and Parks currently use the standard grievance procedure set forth in 2.21.8001 et seq. ARM. (Attached as Appendix A.) This procedure provides for informal attempted resolution followed by a formal hearing before an impartial committee which recommends a decision to the agency head. The agency head may accept, modify or reject the committee recommendation. Employees of Highways and Fish, Wildlife and Parks currently have a statutory right to appeal the director's decision to the Board of Personnel Appeals. Merit System employees have the right to appeal to the Merit System Council.

The issues addressed in this report are:

- 1) The right to judicial review through the Montana Administrative Procedure Act, under the existing system and under a new system tentatively proposed by this Commission,
- 2) The existing avenues to district court for an aggrieved employee, independent of MAPA, and
- 3) The right to due process as it applies to the existing grievance procedures.



## II. Right of appeal through Montana Administrative Procedure Act.

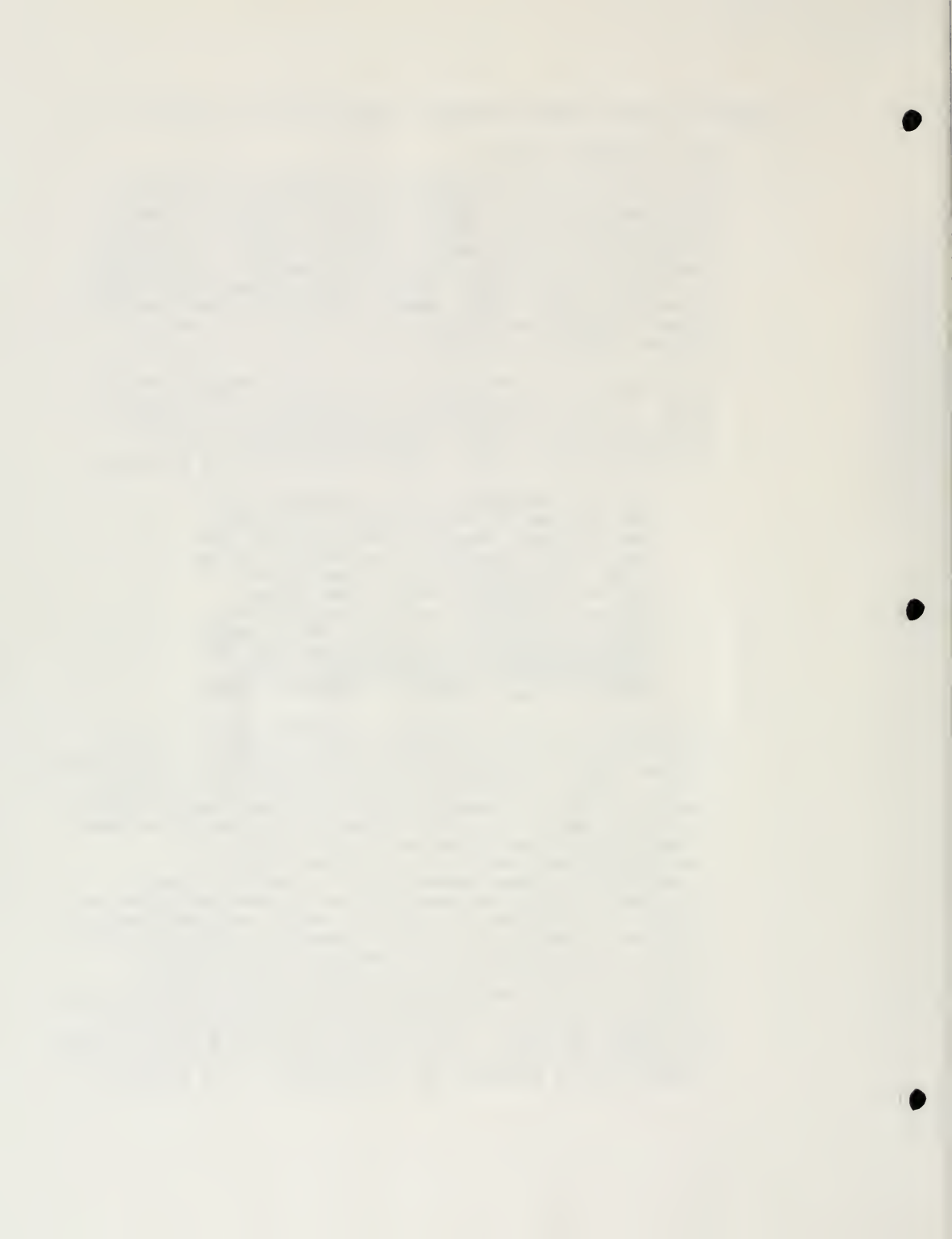
### A. The existing system.

Under the existing hodgepodge of grievance mechanisms, some employees have direct access to district court through the Montana Administrative Procedure Act (MAPA), 2-4-101, MCA, while other employees do not. Grievances handled by the Board of Personnel Appeals for Highways and Fish, Wildlife and Parks employees may be directly appealed through MAPA. Merit System employees may also appeal through MAPA for judicial review of the Merit System Council's decision.

According to the recent opinion of the Montana Supreme Court in *Nye v. Department of Livestock*, MAPA does not apply to grievance proceedings conducted by a state agency pursuant to the standard grievance policy, 2.21.8001 et seq. ARM. The grievance policy provides:

"If the employee is not satisfied with the outcome of the Director's decision, the grievance may be brought before the applicable statutorily authorized review body: the Board of Personnel Appeals, the Merit System Council, the Human Rights Commission, or any appropriate federal enforcement agency, while those grievances not allowed redress with the aforementioned may be pursued at the district court level." (Emphasis added.)

The Court concluded that this language in the administrative rule did not create a right to judicial review. MAPA allows for judicial review of a "contested case," which is defined as "any proceeding before an agency in which a determination of legal rights, duties, or privileges of a party is required by law to be made after an opportunity for hearing." The Court determined that there was not statutory or constitutional requirement that "a person in Nye's position" be given a hearing prior to determination of rights or privileges. Nye was a state employee who had acquired permanent status in a permit clerk position prior to her promotion to a general office clerk V. Upon her promotion she was placed in probationary status. She was discharged during the probation period, but since there was a question of whether she was a permanent employee, a hearing on her grievance was held. The Director rejected the recommendation of the hearing committee and affirmed her termination. The district



court dismissed Nye's claims for judicial review and slander and refused to allow amendment of the complaint to include a claim for the tort of wrongful discharge. The Supreme Court concluded that Nye had achieved permanent status in her former position of permit clerk, that her permanent status was not eliminated by her promotion, and that the Department was required to show just cause for removing her from the permit clerk position. The Court remanded the case to the District Court with specific instructions to stay proceedings until the Department held a grievance hearing with regard to the permit clerk position and if resolution was not achieved to proceed to trial of the wrongful discharge issue. The district court's dismissal of the claim for judicial review under MAPA was upheld. Thus, from my reading of the Nye opinion, it appears that even a permanent employee who pursued a grievance under the standard policy would not have a "contested case" and would therefore not have a right of judicial review through MAPA.

- B. The effect of creating an independent grievance appeals body.

If a statute is enacted which provides a right to a hearing before an independent grievance appeals body for all state employees, then MAPA would operate to give the right to judicial review unless the statute expressly provided otherwise. A statute providing for the right to pursue a grievance to an appeals body would presumably be similar to the Highways grievance statute, Section 2-18-1101, MCA, which provides:

"An employee of the department of highways aggrieved by a serious matter of his employment based upon work conditions, supervision, or the result of an administrative action and who has exhausted all other administrative remedies is entitled to a hearing before the board of personnel appeals, under the provisions of a grievance procedure to be prescribed by the board, for resolution of the grievance." (Emphasis added.)

As soon as a statutory right to a hearing is given to an employee, the "contested case" provisions of MAPA are triggered because there is then a hearing "required by law."

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For example, the Montana Supreme Court recently held that a right of judicial review through MAPA exists in teacher tenure cases. The teacher tenure statute, 20-4-204, MCA, requires notice to a teacher of the decision to terminate, and a hearing before the Board of Trustees if requested by the teacher. The teacher may appeal to the County Superintendent, where a full de novo hearing is held. Either party may appeal to the Superintendent of Public Instruction, who reviews the record and makes a final decision. The Supreme Court held that this procedure constituted a "contested case" under MAPA.

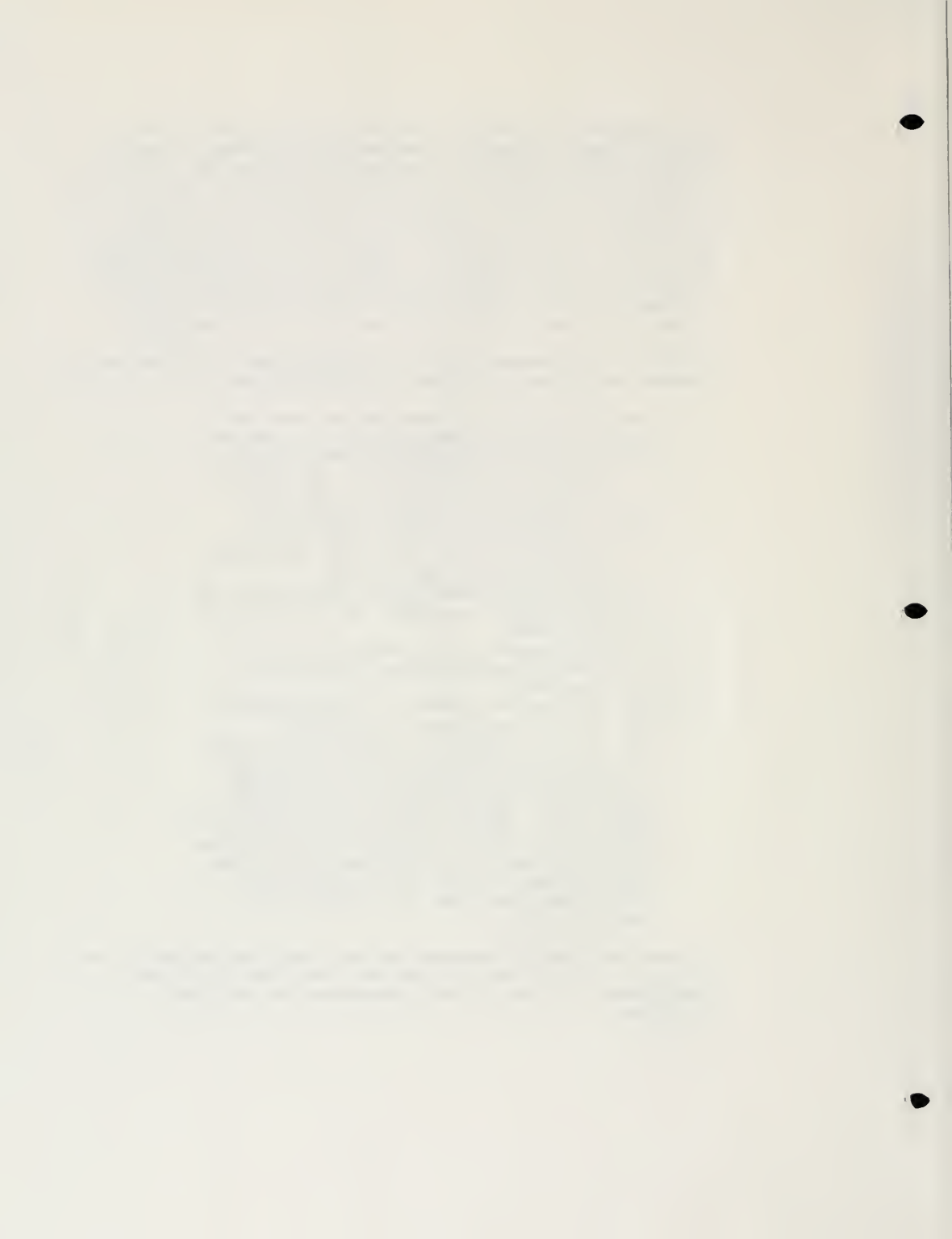
Further, the Supreme Court in Yanzick made the following comment with regard to the appeals process:

"As this review demonstrates, here we have had the following basic procedure:

- (1) An initial determination by the Board of Trustees that the Yanzick contract should not be renewed.
- (2) A rehearing at the request of Yanzick by the Board of Trustees which affirmed its prior decision.
- (3) An appeal to the County Superintendent which was a trial de novo with witnesses and record evidence.
- (4) An appeal to the State Superintendent based upon the record.
- (5) A further appeal to the District Court based upon the record.
- (6) Last an appeal to this Court again involving a review of the record.

We suggest that the initial hearings followed by three separate and in part duplicating appeals does not appear to be judicial economy or an appropriate manner of disposing of a contested case under MAPA without delay. We suggest this is an appropriate area for legislative consideration."

I pass the Court's comment on to this Commission in the hope that the grievance process designed for state employees will not be as cumbersome as that for teachers.



III. What types of grievances can be the basis for an action in district court under the existing system?

A. Discrimination and sexual harassment.

Grievances arising from claims of discrimination or sexual harassment can be brought before the Montana Human Rights Commission and/or the federal Equal Employment Opportunity Commission (EEOC) or other federal enforcement agency, depending upon the specific state or federal statute alleged to have been violated. From the appropriate agency these cases may be pursued into court if the procedures are properly followed.

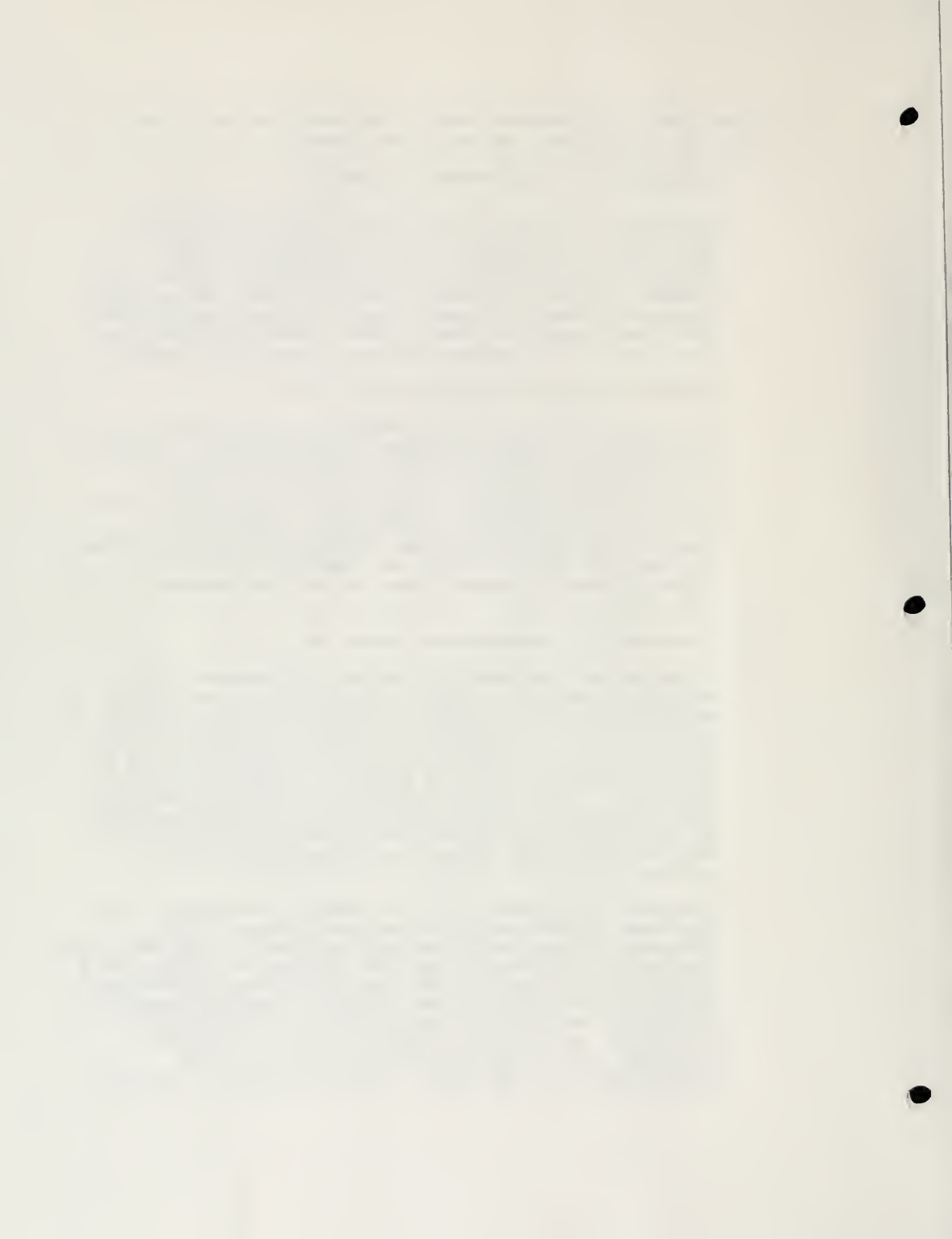
B. Montana Maternity Act, 39-7-201, MCA.

This act prohibits certain employer actions such as termination, refusal to grant reasonable leave, denial of benefits, retaliation, and mandatory leave of unreasonable duration; if these actions are taken because of an employee's pregnancy. The Commission of Labor and Industry has jurisdiction over these complaints, and MAPA applies to provide judicial review. The employee may also file an independent action in district court alleging violation of the statute. 39-7-208, MCA.

C. Terminations, Suspensions, Demotions.

A person who has been involuntarily terminated from employment may have a cause of action for the tort of wrongful discharge, if the discharge was in violation of public policy. The Montana Supreme Court has recently held that administrative rules may be the source of a public policy which would support a claim of wrongful discharge. Failure to follow the discipline handling and grievance procedures promulgated by the Department of Administration and adopted by the agency concerned may therefore give rise to an independent cause of action in district court.

The Montana Supreme Court has recently embraced a new doctrine in employment law called "breach of the covenant of good faith and fair dealing." The doctrine was adopted in order to provide a cause of action for a private sector employee who was terminated without prior notice in violation of the company's employee handbook. The Court could find no public policy or contract violation, but found it unjust to allow a private employer to disregard policies promulgated and disseminated to employees. As of this date, few other



states have adopted this doctrine of breach of good faith; and so far it has been limited to cases involving terminations. It is not certain whether the doctrine could be expanded to include other employer actions such as suspensions and demotions, failure to promote, etc. The opinion emphasized the necessity of considering the interests of the employer in controlling his workforce and serving his legitimate business needs. Still, the possibility of an employee action based on the doctrine of good faith exists in any situation where the employer does not follow its own policies.

A public employer is prohibited from disciplining an employee in retaliation for the employee's exercise of his First Amendment rights -- freedom of speech, association, religion -- and other constitutional rights. Federal and/or state district courts would have jurisdiction to take these cases.

D. Grievances Arising From Other State Policies.

According to the Grievance Policy, 2.21.8002(3), a grievance may be pursued on any dispute involving "the application, meaning or interpretation of personnel policies or procedures and/or other terms and conditions of employment." The Personnel Division currently has policies on reduction in force, performance appraisals, sick leave and annual leave, training and education leave, other types of leave, moving and relocation expenses. All of these policies could give rise to a grievance. Other problems or conflicts with supervisors may result in a grievance. Except where there has been a violation of a statute or an equal protection claim, grievances based on application of these policies would probably not support causes of action in district court. The doctrine of good faith, as discussed above, might be used in court where an agency did not correctly follow the policy. As above noted, the cases have not yet gone this far. Under the current system, most of these less serious grievances would be resolved by the director.

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IV. If the grievance appeals process ends with the agency head, is due process denied to the employee?

Both the U.S. and the Montana Constitutions guarantee that no person shall be deprived of life, liberty or property without due process. In analyzing an employment-related due process issue, two questions are asked:

- 1) Is there a liberty or property interest, and
- 2) If so, what process is "due?"

A. Liberty interest.

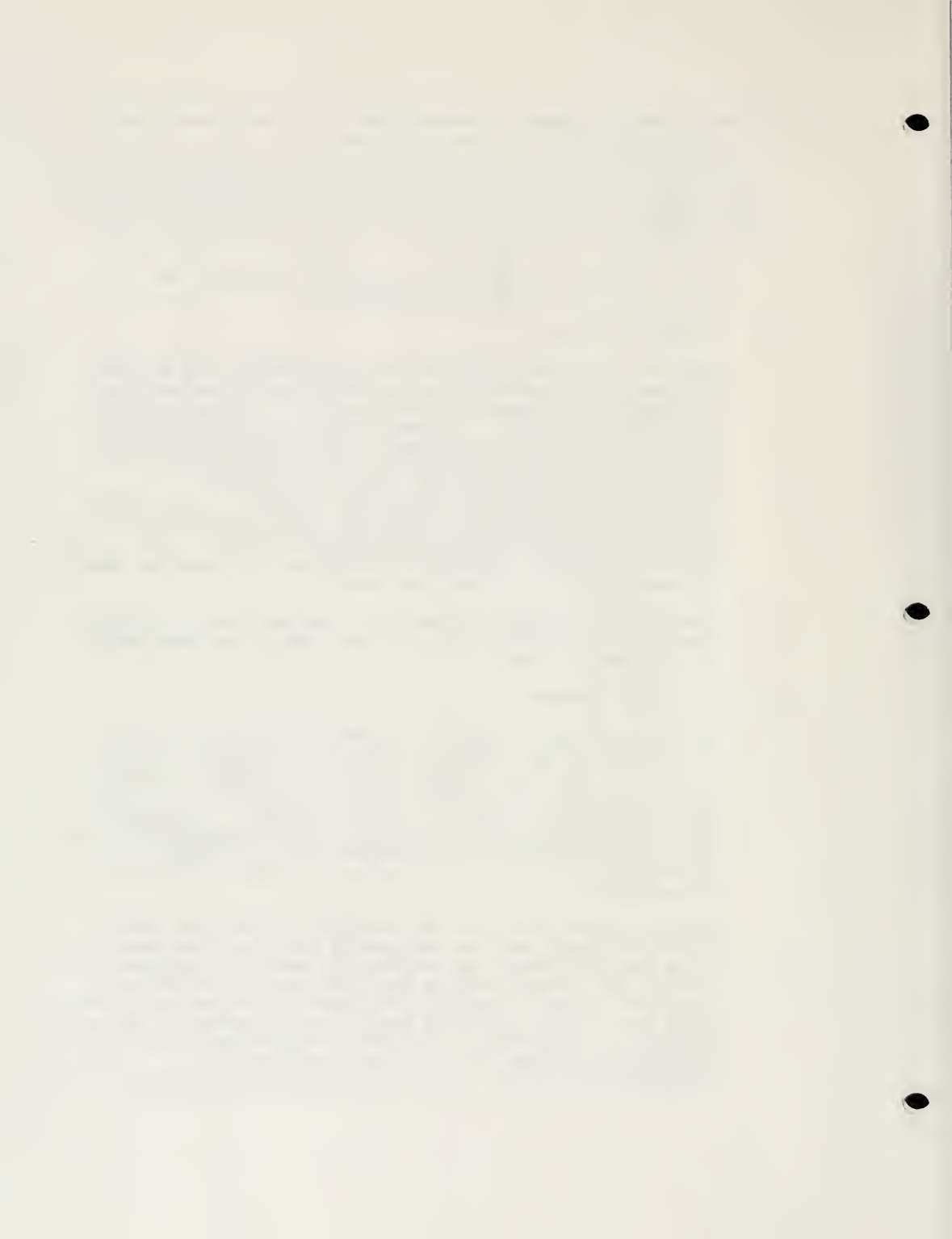
The U.S. Supreme Court has held that there are certain circumstances under which the discharge of an employee from public employment might result in a deprivation of a liberty interest. If the State, in connection with the termination of employment, damaged the employee's reputation, honor or integrity, or imposed upon him a stigma which foreclosed his options of future employment, due process would be required. For example, if the State charged the employee with dishonesty or immorality and if the charges were made public, a hearing would be required in order to give the employee an opportunity to clear his name."

Damage to reputation, standing alone without the loss of employment, does not rise to the level of a deprivation of a liberty interest.

B. Property interest.

An employee may acquire a property interest in his employment if he has "a legitimate claim of entitlement to it." The legitimate claim may be based on state law or on rules and understandings officially promulgated and fostered by the employer. Teachers and professors who have acquired tenure under applicable statutory or contract provisions have a property interest which must be protected by notice and hearing procedures.

Montana state law does not provide, in general, that state employees may be terminated only for just cause. (The Highway Patrol has statutory tenure provisions, 44-1-611, MCA; and there may be other specific statutes granting tenure to certain employees. Tenure may also be a part of a collective bargaining agreement. In such cases, due process is required.) Public employees may acquire "permanent status" after completing a probationary period. 2-18-101(10), MCA. However,





permanent status alone does not give rise to a due process right.

The discipline handling policy promulgated by the Personnel Division, 2.21.6502 ARM, provides:

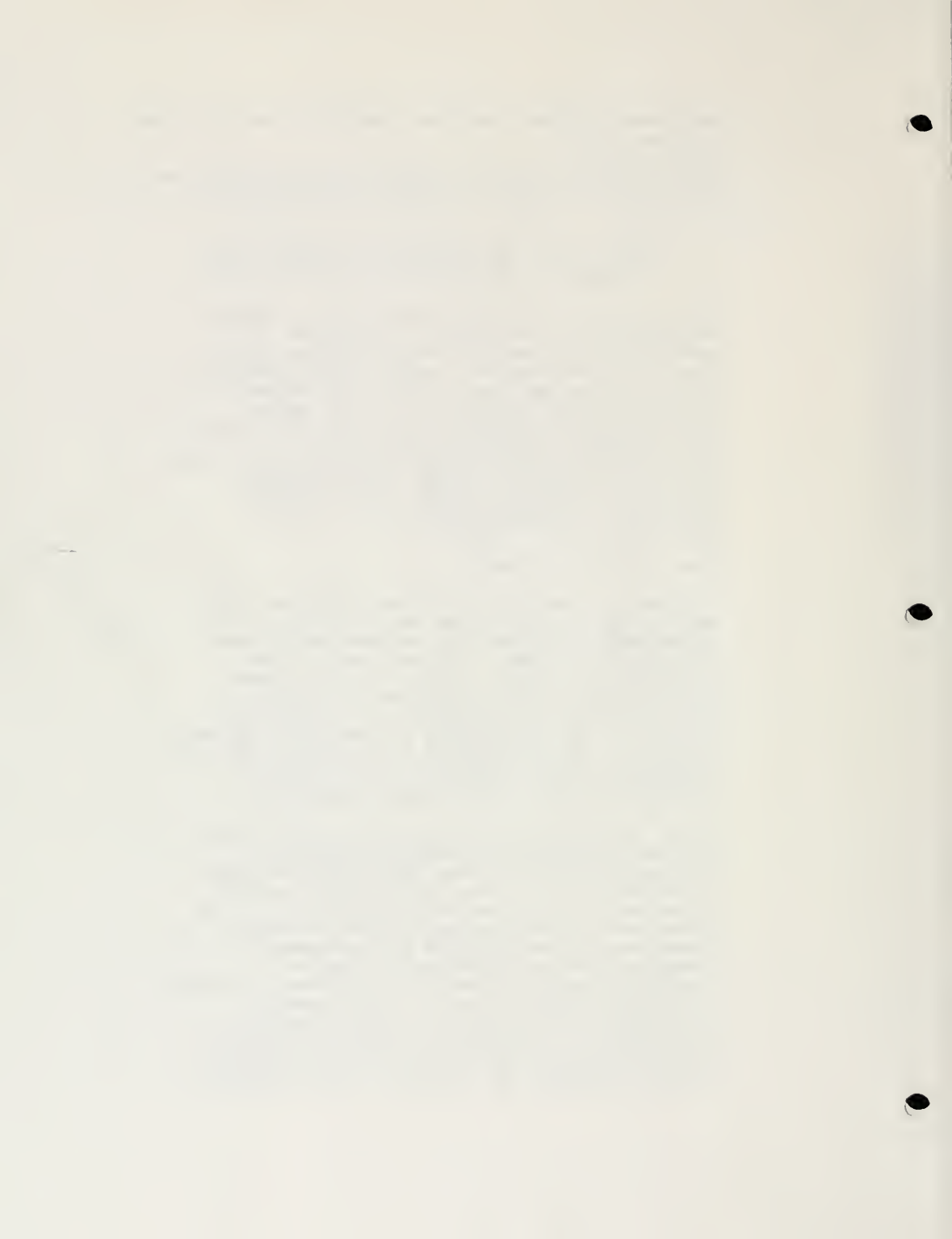
"When punitive discipline is required, just cause, documentation of facts, and due process are required." 2.21.6503(6)

Just cause is defined as substantial reasons relating to the employee's job duties, job performance, or working relationships. Due process is defined as a legal check designed to ensure the employee is informed of the action and the reasons for it, and has an opportunity to respond, to question the action and to defend or explain his conduct. 2.21.6502(4) and (6), ARM. Thus, by rule, the state apparently has given its permanent employees a property right which must be protected by due process.

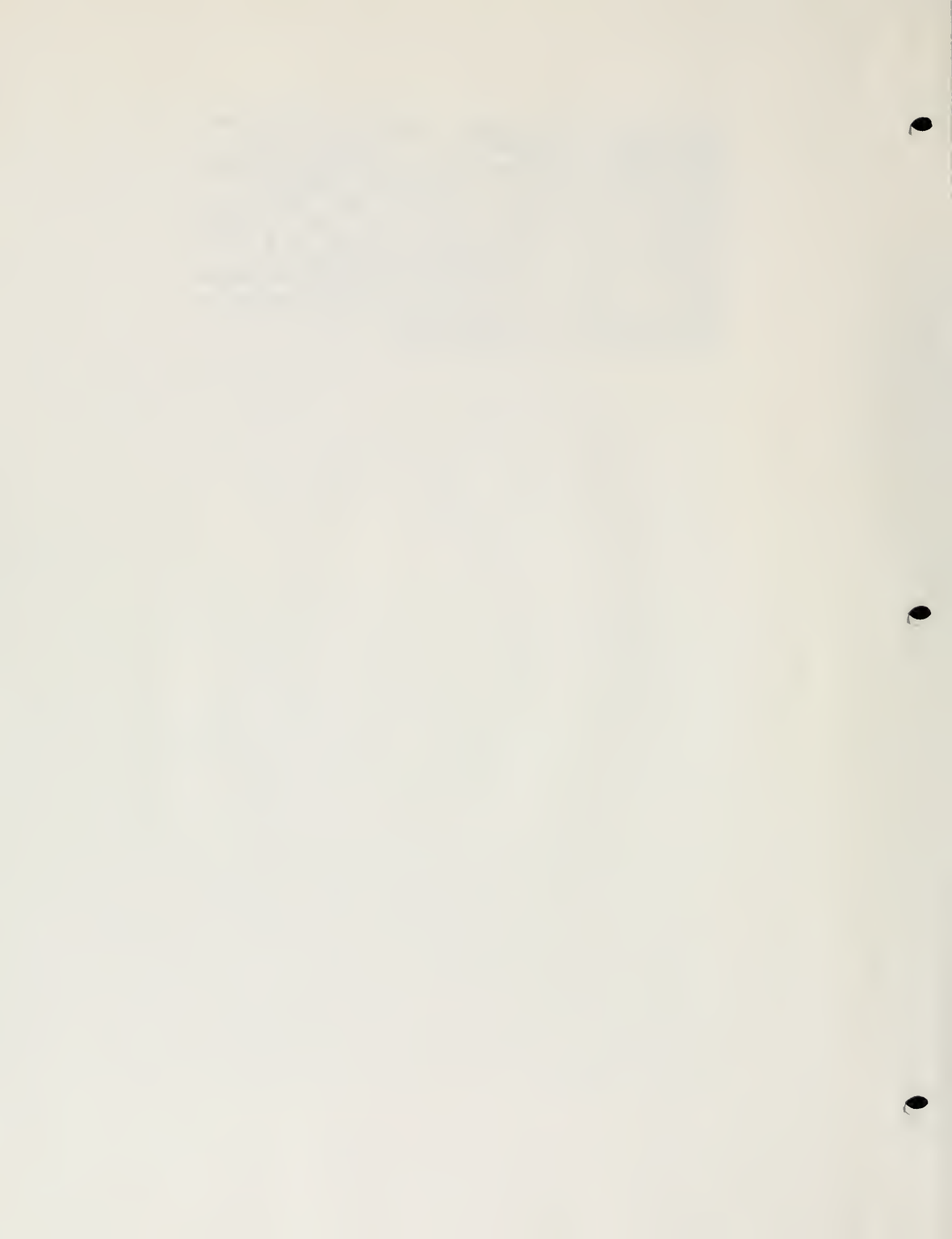
C. What process is "due?"

At the very least, due process requires notice and an opportunity to be heard. There is a wide range of procedures designed to protect due process rights. The more serious the interest, the greater the protection needed. Some interests are considered so important that a full-fledged evidentiary hearing and record are required prior to the taking of the action. However, the U.S. Supreme Court has determined that a hearing is not required prior to dismissal of a public employee.

Basic principles of due process are afforded by the current state employee grievance policy, 2.21.8001 et seq. ARM. The employee is given notice of the disciplinary action taken and the reasons for the action. If the grievance is not resolved within the time frame established by rule for management response, the employee has a right to a hearing before an impartial committee, a right to produce evidence and to cross examine witnesses, and a right to a record of the proceedings. The hearing committee submits a written recommendation based on the evidence to the director, who renders a final decision.



The director may accept, modify or reject the committee's recommendation. Through this process the employee has been given his chance to be heard and to influence the agency to change its decision. The fact that the process ends with the agency does not deny due process. Due process does not require a right to appeal from a final agency decision to district court. Serious employee grievances such as those based on wrongful termination or discrimination can be taken to court independently, as shown above.



FOOTNOTES

- 1 639 P.2d 498, 39 St.Rep. 49 (1982)
- 2 2.21.8008(4), ARM.
- 3 2-4-102(4), MCA.
- 4 See definition of contested case quoted on page  
of this report.
- 5 Yanzick v. School Dist. No. 23 (1982) 39 St.Rep.  
191
- 6 Keneally v. Orgain (1980), 606 P.2d 127, 37 St.Rep.  
154.
- 7 Nye v. Dept. of Livestock, supra.
- 8 Gates v. Life of Montana Insurance Co. (1982), 638  
P.2d 1063, 39 St.Rep. 16
- 9 Bd. of Regents v. Roth (1972), 408 U.S. 564.
- 10 Bishop v. Wood (1976), 426 U.S. 341.
- 11 Roth, supra.
- 12 Paul v. Davis (1976), 424 U.S. 693.
- 13 Bd. of Regents v. Roth, supra.
- 14 Perry v. Sindermann (1972), 408 U.S. 593.
- 15 Bishop v. Wood (1976), 426 U.S. 341; Reiter v.  
Yellowstone Co. (1981), 627 P.2d 845, 38 St.Rep.  
686.
- 16 E.g. termination of welfare benefits, Goldberg v.  
Kelly (1970), 397 U.S. 254; revocation of driver's  
license, Bell v. Burson (1971), 402 U.S. 535;  
garnishment without notice, Sniadach v. Family  
Finance Corp. (1969), 395 U.S. 337.
- 17 Arnett v. Kennedy (1974), 416 U.S. 134.
- 18 2 Am.Jur 2d, Admin. Law Sec. 557; Brinson v. School  
District (Kan. 1978), 576 P.2d602; Ariz. Dept. of  
Economic Security v. Holland (Ariz. 1978), 586 P.2d  
216.

